

LAZ PARKING LTD, LLC)
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 Petitioner,) Docket No. 12-0324
 and)
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 COMMONWEALTH EDISON COMPANY)
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 Respondent.)

For its response (this “Response”) to Respondent Commonwealth Edison Company’s (“ComEd”) Motion for Summary Judgment (the “Motion for Summary Judgment”), Petitioner LAZ Parking LTD, LLC (“LAZ Parking”) states as follows:

Based on the admissions of record in this Docket, ComEd failed to conduct the post-installation test of LAZ Parking's transformer-rated meter as it was required to do by Commission Rule 410.155, 83 Ill. Adm. Code Section 410.155.

First, the Affidavit of LAZ Parking's expert witness, Mr. R. Bernhardt, attached as

Exhibit A to this Response, flatly contradicts the claims of ComEd witnesses Mr. T. Rumsey and Ms. M. Spitz. Contrary to the claims of ComEd's witnesses, the accuracy of LAZ Parking's meter not only can be, but is required by Commission Rules to be tested at LAZ Parking's service location, under load. Mr. Bernhardt's Affidavit shows that had ComEd performed the testing it was required to do under Commission Rule 410.155, that test would have readily revealed the meter constant error involved in this case, and this matter would have been resolved at or about March 13, 2008 (the date that is 90 days after December 14, 2007, the date of ComEd's installation of meter 141362866), and would have involved at most three months' worth of charges, not two years. Commission Rules 410.155 and 410.200(h)(1) create an incentive for an electric utility to perform its post-installation testing obligations in order to fulfill the larger goal of making sure that a customer's usage is accurately recorded and billed.

ComEd's Motion for Summary Judgment attempts to create an artificial separation between the meter and the meter constant. This makes no sense because the meter's purpose is to measure the customer's energy usage, and the determination of usage requires application of the meter constant. Implicit in ComEd's logic is that a meter technician performing the post-installation testing required by Commission Rule 410.155 would neither know nor care whether the meter were accurately recording the customer's energy usage. Metering a customer's energy usage requires both the physical metering device and billing multipliers that are applied to the raw meter data. ComEd's argument that the meter has nothing to do with the meter constant is ludicrous.

Second, ComEd itself admits in its Motion for Summary Judgment that a genuine issue of material fact exists in this case. ComEd states that the term "meter constant" is "key to this case"

and “absolutely must be defined, on record, in this proceeding.” (ComEd Motion for Summary Judgment, at pg. 10). ComEd thus admits that this case cannot be decided on summary judgment because a material fact, the definition of the term meter constant, must be determined for the record in this case. Like a careless carpenter, ComEd saws the floor out from beneath itself.

In response to the Motion for Summary Judgment, LAZ Parking, as the non-movant, does not have to prove its case. LAZ Parking does not have to prove that ComEd’s witnesses are wrong and LAZ Parking’s is right. To defeat ComEd’s Motion for Summary Judgment LAZ Parking need only show that there exists a genuine issue of material fact. ComEd itself has shown that one such genuine issue of material fact exists, and Mr. Bernhardt’s Affidavit shows the existence of yet another. Either one, by itself, is fatal to ComEd’s Motion for Summary Judgment, and therefore it must be denied.

II. Procedural Background

On May 2, 2012, LAZ Parking filed its complaint (the “Complaint”) against Commonwealth Edison Company (“ComEd”) to recover \$259,938 wrongfully back-billed to LAZ Parking by ComEd. The Complaint as originally filed stated five counts. ComEd claimed that LAZ parking had been billed with an incorrect meter constant, resulting in alleged under-billing of LAZ Parking’s account. (Complaint, Exhibit D). However, ComEd failed to comply with the accuracy and testing requirements set forth in Part 410 of the Rules of the Illinois Commerce Commission (the “Commission”), and therefore ComEd’s adjustment of its bills to LAZ Parking is unlawful under 83 Ill. Adm. Code Section 410.200(h)(1). (Complaint, Count II).

LAZ Parking served ComEd with discovery in July 2012. LAZ Parking had issues with

ComEd's responses to discovery, and, pursuant to Supreme Court Rule 201(k) and Commission Rule 200.350, from August through early October 2012 LAZ Parking repeatedly requested ComEd to schedule a telephone conference to discuss these discovery issues. ComEd uniformly ignored each of these requests. (*See* LAZ Parking's Reply in Support of Motion to Deem Admitted, Exhibits A through D).

On October 5, 2012, LAZ Parking served ComEd with its First Set of Requests for Admission (the "Requests for Admission"). On October 31, 2012, ComEd served on LAZ Parking its responses to the Requests for Admission.

On November 12, 2012, LAZ Parking filed its Motion to Deem Admitted Certain Facts Pursuant to Requests for Admission and Responses Thereto (the "Motion to Deem Admitted"). Only after LAZ Parking filed the Motion to Deem Admitted did ComEd agree to confer with LAZ Parking by telephone regarding discovery issues (November 16, 2012). ComEd filed its Response in Opposition to LAZ Parking's Motion to Deem Admitted on December 17, 2012.

The other procedural events in this case are as follows:

- a) On June 10, 2013, ComEd filed its "Motion to Dismiss Complaint on the Merits" (ComEd's "Original Motion to Dismiss").
- b) On June 13, 2013, the Administrative Law Judge (the "ALJ") ruled that ComEd's Original Motion to Dismiss would be held in abeyance pending resolution of LAZ Parking's Motion to Deem Admitted. Oral argument on the Motion to Deem Admitted was held on June 28, 2013.
- c) At a status hearing held on December 4, 2013, LAZ Parking moved to voluntarily dismiss Counts I, III and IV from the Complaint. Counts II and V remain.
- d) On February 13, 2014, the ALJ issued a ruling granting LAZ Parking's Motion to Deem Admitted.
- e) On February 14, 2014, LAZ Parking filed its Motion to Strike ComEd's Original

Motion to Dismiss. On February 20, 2014, the ALJ struck the briefing schedule on ComEd's Original Motion to Dismiss pending resolution of the Motion to Strike ComEd's Original Motion to Dismiss.

- f) On February 27, 2014, ComEd filed its Motion to Reconsider ALJ Ruling of February 13, 2014 (ComEd's "Motion to Reconsider"). On February 28, 2014, the ALJ issued a ruling holding in abeyance the briefing schedule on the Motion to Strike ComEd's Original Motion to Dismiss and establishing a briefing schedule on ComEd's Motion to Reconsider, which was subsequently fully briefed.
- g) On March 9, 2015, the ALJ entered an order denying ComEd's Motion to Reconsider and granting ComEd leave to file an amended motion to dismiss.
- h) On April 30, 2015 ComEd filed its Amended Motion to Dismiss on the Merits (the "Amended Motion to Dismiss").
- i) On May 14, 2015, LAZ Parking filed its Motion to Clarify, to Strike and to Continue Generally the Hearing on ComEd's Amended Motion to Dismiss (the "Motion to Clarify and Strike"). The gist of LAZ Parking's Motion to Clarify and Strike was that ComEd's Amended Motion to Dismiss was legally unintelligible. LAZ Parking could not determine whether ComEd was moving to dismiss the Complaint for failure to state a claim under Section 2-615 (735 ILCS 5/2-615), making a motion for summary judgment under Section 2-1005 (735 ILCS 5/2-1005), or making a combined motion that failed to comply with Section 2-619.1 (735 ILC 5/2-619.1). Despite losing on both LAZ Parking's Motion to Deem Admitted and its own Motion to Reconsider, and despite litigating ComEd's Rule 216 admissions for almost two and a half years (November 12, 2012 – March 9, 2015), ComEd's Amended Motion to Dismiss still sought to relitigate its Rule 216 admissions (see ComEd Amended Motion to Dismiss, pgs. 12-18).
- j) At a status hearing on May 29, 2015, LAZ Parking and ComEd agreed that ComEd would advise by June 8, 2015 whether it would stand by its Amended Motion to Dismiss, and therefore respond to LAZ Parking's Motion to Clarify and Strike, or whether it would file a motion for summary judgment. (Transcript, Status Hearing May 29, 2015, pg. 168, ln. 22 to pg. 170, ln. 2). ComEd duly notified LAZ Parking that it planned to file a motion for summary judgment.
- k) On June 30, 2015, ComEd filed its Motion for Summary Judgment, in answer to which LAZ Parking files this Response.

III. Standard of Review

ComEd's Motion for Summary Judgment may be granted only if the pleadings,

depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. 735 ILCS 5/2-1005. Summary judgment is proper only where the evidence, when construed most strongly against ComEd as the moving party, and most liberally in favor of LAZ Parking, establishes clearly and without doubt the right to summary judgment. *Fisher v. Crippen*, 144 Ill. App. 3d 239, 242 (5th Dist. 1986); *Kolakowski v. Voris*, 83 Ill. 2d 388, 398 (1980). Although summary judgment is encouraged as an aid to expeditious disposal of a lawsuit, it is a drastic means of disposing of litigation and should only be allowed when the right of the moving party is clear and free from doubt. *Founders Ins. Co. v. Munoz*, 389 Ill. App. 3d 744, 749, 905 N.E.2d 902 (1st Dist. 2009), *affirmed in part, reversed in part on other grounds*, 237 Ill.2d 424 (2010).

Even if the facts are undisputed, if reasonable persons could draw different inferences from those facts, summary judgment is inappropriate. *Wood v. National Liability and Fire Ins. Co.*, 324 Ill. App. 3d 583, 755 N.E.2d 1044, 1047 (2nd Dist. 2001). In ruling on ComEd's Motion for Summary Judgment, the Commission is to determine only whether a genuine issue of material fact exists, not to try questions of fact. *Waugh v. Morgan Stanley and Co., Inc.*, 966 N.E.2d 540, 549 (1st Dist. 2012), *appeal denied*, 979 N.E.2d 890 (2012). LAZ Parking need not prove its case at summary judgment stage, but need only present a factual basis that would arguably entitle it to judgment under applicable law. *Conrad v. Christ Community Hospital*, 77 Ill. App. 3d 337, 395 N.E.2d 1158, 1161 (1st Dist. 1979); *Martin v. 1727 Corp.*, 120 Ill. App. 3d 733, 458 N.E.2d 990, 993 (1st Dist. 1983).

ComEd's Motion for Summary Judgment "almost necessarily assumes that a cause of action has been stated, and proceeds to determine whether there are any material issues of fact to

be tried....” *Janes v. First Federal Savings & Loan Assoc.*, 57 Ill. 2d 398, 406 (1974). A motion for summary judgment challenges the factual sufficiency of plaintiff’s claim. *Barber-Colman Co. v. A & K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1073 (5th Dist. 1992).

IV. A Genuine Issue of Material Fact Exists As To Whether Post-Installation Testing Would Have Revealed the Meter Constant Discrepancy

ComEd’s witness Mr. Rumsey concludes that “neither meter testing nor any type of post-installation testing would reveal the incorrectness of the LAZ or any other customer’s meter constant (as this is a matter based solely on the entry of current transformer specifics and other information into ComEd’s CIMS [i.e., customer information management system] for billing purposes).” (ComEd Motion for Summary Judgment, Exhibit A, Rumsey Affidavit, par. 11).

To the contrary, Mr. Bernhardt’s Affidavit shows that a post-installation test of the accuracy of 141362866 would have been performed by using a “portable standard,” which is a highly accurate testing meter. (Bernhardt Affidavit, pars. 18, 19 and 22). The same voltage, current and phase angle would have been applied to both 141362866 and the portable standard for the same period of time. (Bernhardt Affidavit, par. 23). When the test was complete, the usage recorded by the standard would have been compared to the usage recorded by 141362866. (Bernhardt Affidavit, par. 24). The usage recorded by a meter is determined by applying the billing multipliers such as the meter constant. (Bernhardt Affidavit, pars. 28, 29 and 30). Had ComEd performed the post-installation test required by Commission Rule 410.155, the application of the wrong meter constant would have readily revealed a gross discrepancy between the usage recorded by 141362866 and that recorded by the portable standard. Indeed, it would have been just as evident to a technician performing the post-installation test required by Commission Regulation 410.155 as it was to ComEd witness Ms. Spitz when she reviewed other

data concerning 141362866. (ComEd Motion for Summary Judgment, Exhibit B, Spitz Affidavit, pars. 4, 5, 9 and 10). Thus, Mr. Bernhardt concludes that both ComEd witnesses Mr. Rumsey and Ms. Spitz are completely wrong in their conclusion that no post-installation testing would have revealed the meter constant problem. (Bernhardt Affidavit, pars. 30, 31 and 32).

Furthermore, the senselessness of ComEd's position is apparent simply by reading Commission Rule 410.155. This rule requires a test of a transformer-rated meter such 141362866 within 90 days after its installation "under load to determine if the meter is accurately measuring customer energy consumption." The conclusions of ComEd witnesses Mr. Rumsey and Ms. Spitz that no post-installation test would have revealed the vastly discrepant usage between 141362866 and a portable standard would make the testing required by Commission Rule 410.155 a useless exercise.

As discussed above under Standards of Review, to decide ComEd's Motion for Summary Judgment, the Commission does not have to determine that Mr. Rumsey and Ms. Spitz are wrong and that Mr. Bernhardt is right. It need only recognize that ComEd's witnesses and LAZ Parking's witness disagree on what post-installation testing would or would not have shown. Through this Response and the Affidavit of Mr. Bernhardt, LAZ Parking has more than met that burden. Therefore, ComEd's Motion for Summary Judgment must be denied.

V. ComEd Admits In Its Own Motion That There Is a Genuine Issue of Material Fact In This Docket

Although ComEd takes about thirty pages to argue to that there is no genuine issue of material fact in this case, it guarantees the defeat of its own motion by expressly admitting that there is a genuine issue of material fact in this Docket. ComEd states the following in its Motion for Summary Judgment:

ComEd employee Vanessa Williams-Anderson sent LAZ Parking a letter explaining, in part, that:

Our records indicate you have been billed for electricity recorded on meter 141362866 located at 25 N. Michigan, Chicago, with an incorrect meter constant that resulted in your being billed for less electricity than you actually used.

The term “meter constant” is key to this case. It is a technical term. It is a term that absolutely must be defined, on record, in this proceeding.

(ComEd Motion for Summary Judgment, at pg. 10) (emphasis added). ComEd then goes on to cite Rule 702 of the Illinois Rules of Evidence to the effect that if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. ComEd then discusses the capabilities and opinions of its witness Mr. T. Rumsey, and in particular his opinion that the meter constant is not part of the meter.

Thus, in its own Motion for Summary Judgment, ComEd admits that the issue of the meter constant definition is “key” (that is, material) to this case, and that it is a technical fact to which an expert may testify as contemplated by Rule 702 of the Illinois Rules of Evidence. This alone is sufficient grounds on which to deny ComEd’s Motion for Summary Judgment.

Furthermore, LAZ Parking witness Mr. Bernhardt directly contradicts ComEd’s chief witness on this “key” issue. ComEd’s artificial separation of the meter and the meter constant makes no difference because the required testing must determine whether the meter is accurately recording customer usage. Usage determination requires application of the billing multipliers, including the meter constant. (Bernhardt Affidavit, pars. 28, 29 and 30). Therefore, even if the

Commission were to strike ComEd’s “key issue” discussion from its motion, a genuine issue of material fact would still exist based on Mr. Bernhardt’s Affidavit. ComEd is not, therefore, entitled to judgment as a matter of law, and its Motion for Summary Judgment must be denied.

VI. ComEd’s Arguments About Whether Part 280 or Part 410 Applies to Its Motion for Summary Judgment Are Irrelevant

ComEd is still fundamentally confused as to what a motion for summary judgment is all about. On page 1 of its motion, ComEd states that “this case is essentially a dispute over which law applies in the situation, Part 280 or Part 410 of the Commission’s rules.” [Footnote omitted.] ComEd asks the Commission to “determine which law applies to the situation at hand.” (ComEd Motion for Summary Judgment, pg. 3). “This case is a straightforward dispute rooted in a disagreement over which of two Commission rules govern in the back-billing of LAZ, i.e., Section 280.100 or 410.200(h)(1).” (ComEd Motion for Summary Judgment, pg. 6). ComEd makes similar claims elsewhere in its Motion for Summary Judgment. (ComEd Motion for Summary Judgment, pgs. 6-9).

As stated in Section III, above, a motion for summary judgment tests the *factual* sufficiency of the complaint. For purposes of its Motion for Summary Judgment, ComEd almost necessarily assumes that the Complaint states a cause of action. *Janes v. First Federal Savings*, supra, 57 Ill. 2d at 406. ComEd’s claims that one part of the Commission’s rules rather than another governs this dispute is an attack on the *legal* sufficiency of the Complaint, not the underlying facts. If ComEd wishes to attack the Complaint’s *legal* sufficiency, then a motion under Section 2-615 for failure to state a claim is the appropriate vehicle. *Barber-Colman*, supra, 236 Ill. App. 3d at 1068. Hybrid motions (e.g., blending a motion to dismiss for failure to state a claim and a motion for summary judgment) are prohibited under Illinois law, 735 ILCS 5/2-

619.1. ComEd's position is that its motion is one for summary judgment, and therefore only factual issues are at stake here. ComEd's arguments about the applicability of Parts 280 and 410 are therefore completely irrelevant to its Motion for Summary Judgment.

VII. ComEd May Not Continue to Place Its Rule 216 Admissions in Controversy

The balance of ComEd's Motion for Summary Judgment amounts to yet another attempt to re-litigate its Rule 216 admissions. All of the issues ComEd raises now are the same ones it raised when the Motion to Deem Admitted was originally litigated, the same ones it argued before the ALJ on June 28, 2013, and the same ones it offered in its Motion for Reconsideration of the ALJ's Order of February 13, 2014.

An admission pursuant to a request to admit facts operates as a judicial admission that is considered incontrovertible and has the effect of withdrawing a fact from contention, *Moy v. Ng*, 341 Ill. App.3d 984, 988, 793 N.E.2d 919, 924 (1st Dist. 2003), *appeal denied*, 206 Ill.2d 624, 806 N.E.2d 1067, *on remand* 2004 WL 5584441. Admissions made pursuant to a request to admit are tantamount to judicial admissions and as such are taken as true, *Hoover v. Country Mut. Ins. Co.*, 363 Ill. Dec. 612, 619, 975 N.E.2d 638, 645 (Ill. App. 1st Dist. 2012). Admissions pursuant to requests to admit constitute judicial admissions, which are binding upon the party making them; they may not be controverted at trial or in a motion for summary judgment, and only in extraordinary circumstances may a party escape the consequences of a judicial admission. M. Graham, *Cleary & Graham's Handbook of Illinois Evidence* § 802.11, at 779 (7th ed. 1999), cited with approval in *Ellis v. American Family Mut. Ins. Co.*, 750 N.E.2d 1287, 1290, 255 Ill. Dec. 902, 905, 322 Ill. App.3d 1006, 1010 (Ill.App. 4th Dist. 2001).

Thus, while Illinois law prohibits ComEd from controverting its Rule 216 admissions in

either its Motion for Summary Judgment (*see* Motion for Summary Judgment, pgs. 19-30) or in its Amended Motion to Dismiss (*see* Amended Motion to Dismiss, pgs. 14-19), that is precisely what ComEd did. As ComEd's Motion for Summary Judgment and its previous motions show, ComEd will continue to re-litigate its Rule 216 admissions unless the Commission orders it to stop.

WHEREFORE, LAZ Parking LTD, LLC requests that the Commission enter an order:

- (1) Denying ComEd's Motion for Summary Judgment; and
- (2) Prohibiting ComEd from continuing to place its Rule 216 admissions in controversy in this Docket.

Dated: September 25, 2015

Respectfully submitted,

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Attachment:

Exhibit A – Affidavit of Richard B. Bernhardt